No. 12428

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM P. THORNTON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

H. G. MORISON,
Assistant Attorney General
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General.

J. CHARLES DENNIS,
United States Attorney.
JOHN E. BELCHER,
Assistant United States Attorney.

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JURISDICTION

Appellee brought this suit to recover compensation for official services as an officer of the United States by virtue of appointment as a civil-service employee of the United States, serving from July 10 to August 14, 1947, in the capacity of night mate aboard the United States Army Transport *Goucher Victory.*

Appellee's suit was originally begun July 7, 1948, by a civil complaint, invoking the jurisdiction of the district court under the Tucker Act, former 28 U. S. Code 41 (20), now 28 U. S. Code 1346 (a) (R. 2–4). The Government answered (R. 6) and moved to dismiss on the ground that the court had no jurisdiction by reason of the exception found in the

Tucker Act of district court jurisdiction of suits to recover "compensation for official services of officers of the United States" (R. 15–16). Thereafter, on July 5, 1949, appellee petitioned to amend and transfer his suit to the admiralty side of the court, and, "being satisfied that jurisdiction should be invoked under the Public Vessels Act" (R. 20–21), tendered with his petition an amended libel, invoking the jurisdiction of the district court under the Public Vessels and Suits in Admiralty Acts (R. 20–25). With the Government's acquiescence the district court, on July 13, 1949, ordered the transfer and allowed the filing of the amended libel (R. 25–27), the Government filing protective exceptions and motion to dismiss (R. 31).

The district court, Honorable John C. Bowen, District Judge, on August 15, 1949, filed findings of fact, conclusions of law, and a decree under the Public Vessels Act, awarding appellee $603.75, together with interest at the rate of six percent per annum from the date of entry of the decree (R. 33–38). The Government filed notice of appeal on November 8, 1949 (R. 38–39) and on December 13, 1949, assigned error as to the jurisdiction and as to the award of interest in excess of four percent (R. 42). The jurisdiction of this Court rests upon 28 U. S. Code 1291.

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction of the cause of action under the Public Vessels and Suits in Admiralty Acts (46 U. S. Code 781–782 and 742–743); and if so,

2. Whether the district court had jurisdiction to award interest at any rate in excess of four percent, in view of the provision of 46 U. S. Code 782, directing Public Vessels Act suits "to proceed in accordance with the provisions of" the Suits in Admiralty Act which, in 46 U. S. Code 743, limits interest to four percent.

STATEMENT

The principal facts were not disputed and may be summarized from the findings of the district court (R. 34–35). Between July 10 and August 14, 1947, the United States was the owner of the United States Army Transport *Goucher Victory,* employed exclusively as a public vessel and stationed at the Port of Seattle, Washington. For 35 days during that period appellee William P. Thornton, while employed by the Army, worked 525 hours at the rate of $1.15 per hour as Night Mate on that vessel pursuant to the orders of the Marine Superintendent of the Seattle Port of Embarkation who was "a person having authority to hire" appellee. These services were necessary to the United States, which employed no other person to perform them and accepted their benefit but failed to pay appellee their conceded value of $603.75.

The reason for the failure of appellee to obtain payment was not disputed nor specifically found by the district court. From the whole of the record it appears to have been because of administrative confusion. The fiscal official responsible for certifying appellee's pay roll was afraid to do so, apparently for

fear that the amount would be charged back against him personally as an invalid payment. Appellee's status was that of an intermittent or per diem civil-service employee, receiving official compensation only for the time he was actually working. Appellee had been ordered to perform the particular job in question after certain administrative steps had been taken to terminate his general status of civil-service employee, but before all steps had been completed and before either he or the operating official who ordered him to work had been notified of the termination. In the circumstances, the district court appears to have believed appellee performed the work under his validly subsisting prior appointment. That conclusion was acquiesced in by the Government in the court below and is not questioned here.

ARGUMENT

I

This Court must determine the validity of its prior holdings that the Public Vessels Act extends jurisdiction to all suits for damages caused by public vessels, including persons acting in their behalf

In reliance upon the statute's literal language and the decisions of this Court in *United States* v. *Loyola,* (9th Cir.) 1947 A. M. C. 994, 161 F. 2d 126, 127, and *O. F. Nelson & Co.* v. *United States,* (9th Cir.) 1945 A. M. C. 1161, 149 F. 2d 692, 698, as well as of the Supreme Court and other courts of appeals in *Canadian Aviator, Inc.* v. *United States,* 1946 A. M. C. 1730, 324 U. S. 215, 228; *American Stevedores* v. *Porello,* 1947 A. M. C. 349, 330 U. S. 446, 450, and *United States* v. *Caffrey,* (2d Cir.) 1944 A. M .C. 439, 141 F. 2d 69, 70, cert. den. 319 U. S. 730, many suits

for wages have been brought and maintained under the Public Vessels and Suits in Admiralty Acts by civil-service seamen of the Army Transport Service and the numerous other government agencies employing public vessels of the United States exclusively as public vessels and not as merchant vessels. It has always been regarded as inequitable in the highest degree to reject the literal language of the statute and this Court's view and attempt to distinguish between the rights of civil-service seamen serving on public vessels according as the vessels are employed solely as public vessels or employed as "merchant vessel" by reason of carrying some commercial cargo or passengers for hire. The distinction is often one of quantity and degree and is largely accidental so that seamen's rights ought not to depend on it. Cf. *The Western Maid,* (1922) 257 U. S. 419; *James Shewan & Sons, Inc.* v. *United States,* (1924) 266 U. S. 108; *The Lake Lida,* (4th Cir., 1923) 290 Fed. 178.

It has never been questioned that civil-service seamen, seeking recovery for services on public vessels which are employed as merchant vessels, have the seaman's traditional remedy by suit in admiralty to recover for wages as well as for maintenance and cure and that jurisdiction of such suits is founded on the Suits in Admiralty Act with its two-year statute of limitations (46 U. S. Code 743). Cf. *McCrea* v. *United States,* 1935 A. M. C. 1, 294 U. S. 23. Civil-service seamen such as appellee here, serving on public vessels, such as hospital ships, army tranports, coastal survey vessels and harbor and river patrol craft of all services, which are employed exclusively as public

vessels, have equally enjoyed the same remedy under the Public Vessels Act with the same two-year limitation (46 U. S. Code 782, 743).

In the companion appeal, No. 12400, *Thomason et al.* v. *United States,* now pending before this Court, the contention is for the first time being made that such civil-service seamen serving on vessels which chance to be employed exclusively as public vessels do not have the same traditional remedy in admiralty as they would have had if the vessels had carried some commercial cargo, so as to be "employed as merchant vessels. They are therefore not subject to the two-year limitation but, instead, may bring suit at law under the Tucker Act (28 U. S. Code 1346, former 28 U. S. Code 41 (20)) where, however, they can obtain the benefit of the six-year statute of limitations.

This contention for unequal treatment of civil-service seamen of public vessels according to the use the Government chances to make of the vessel is not being made by the United States, which on the contrary is resisting the claim to unequal treatment. It is being made by the attorneys for *Thomason et al.* They urge this unequal treatment in order to permit the seamen in that particular case, who failed to file timely suit within the two-year statute of limitations provided by the Public Vessels and Suits in Admiralty Acts (46 U. S. Code 782, 743), to now bring suit within the six-year limitation of the Tucker Act (28 U. S. Code 2401 (a), former 28 U. S. Code 41 (20)).

The attorneys for the Government cannot voluntarily confer jurisdiction on the district court. *Minnesota* v. *United States,* (1939) 305 U. S. 382, 388; *Munro* v. *United States,* (1937) 303 U. S. 36, 41. But we be-

lieve in the present case the court below correctly followed the prior decisions of this Court and held it had jurisdiction of the present suit under the Public Vessels and Suits in Admiralty Acts. We point to the question of jurisdiction found in the record in this case solely because if this Court accepts the contention of appellants in No. 12400, overrules its prior decisions and reverses that case, then, but only then, the decree for appellee in this case must likewise be reversed.

We believe that the literal language of the statute as followed by this Court's decision in *United States* v. *Loyola,* 1947 A. M. C. 994, 161 F. 2d 126, and by the decision of Judge Mathes in *Jentry* v. *United States* (S. D. Calif.), 1948 A. M. C. 58, 73 F. Supp. 899, are fully dispositive of the question of the district court's jurisdiction in this present case. The statute (46 U. S. Code 781) provides:

> A libel in personam in admiralty may be brought against the United States for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.

And it is elementary that a libel *for damages* is all inclusive for "damages" is the compensation awarded for breach of any obligation, whether sounding in contract or tort.

It is equally familiar that a libel or civil action for money *damages* is the only remedy against itself to which the United States has ever consented. Thus the Tucker Act authorizes suits for "*damages* in cases not sounding in tort" (28 U. S. Code 1346 (a–2)).

"Damages consist in compensation for loss sustained. * * * By the general system of our law, for every invasion of right there is a remedy, and that remedy is compensation. This compensation is furnished in the damages which are awarded." See *The Steel Trader,* 1928 A. M. C. 162, 275 U. S. 388, 391, quoting Sedgwick's *Damages.* And the language of the Public Vessels Act itself confirms that claims for "damages" through breach of contract as well as tort are included, for it expressly provides (46 U. S. Code 782) that no interest shall be allowed prior to judgment except "upon a contract expressly stipulating for the payment of interest."

The Public Vessels Act, just like the Tucker Act, thus permits the bringing of suits "for damages" for breach of contract. But unlike the Tucker Act it is not confined to "cases not sounding in tort." The Public Vessels Act, complementing the Suits in Admiralty Act, authorizes libels "for damages" in tort and contract alike. Thus the Supreme Court in *American Stevedores* v. *Porello,* 1946 A. M. C. 163, 330 U. S. 446, 450, fn. 6, called particular attention to the fact that the statute used the word *damages* "which means a compensation in money for loss or damage." And in *Canadian Aviator* v. *United States,* 1946 A. M. C. 1730, 324 U. S. 215, 228, the court had previously expressly declared, "We hold that the Public Vessels Act was intended to impose on the United States the same liability * * * as is imposed by the admiralty law on the private shipowner."

The fact that appellee's damages were caused by the breach of his contract of employment by persons

acting on behalf of the vessel, rather than by the public vessel itself as an instrument, involves nothing more than the traditional admiralty personification of the vessel. Indeed the Supreme Court in the *Canadian Aviator* case has pointed out that in using such language Congress merely adopted "the customary legal terminology of the admiralty law," which refers to the vessel as causing every act which her personnel do in her behalf. "Such personification of the vessel," said the Court, "treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court." And in *Porello,* as we have seen, the Court emphasized that in providing for suit "for damages" Congress undoubtedly had firmly in mind the distinction between "damage," meaning merely loss or injury, and its plural, "damages," meaning the compensation recovered in money for loss or damage however caused. If there still lingers in the language something of the flavor of tort we need not be surprised. At the common law it is familiar that the action for breach of a simple contract was in *assumpsit,* a writ framed on the case after those sounding in tort for trespass or deceit. Ames, *History of Assumpsit,* 3 Select Essays on Anglo-American Legal History 259.

Considerations of practical convenience demand equality of treatment of civil-service seamen serving on government vessels, whether the vessels are employed by the Government as "merchant vessels" or exclusively as public vessels. The rule of strict con-

struction of statutes permitting suit against the sovereign should not be employed to create arbitrary distinctions which serve only to frustrate honest litigants and make cases turn on the accidents of operations. Courts should not be unmindful of the rule that, "The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures." *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47, 53–54. But as the Supreme Court itself there noted, "When authority to sue is given that authority is liberally construed to accomplish its purpose." See also *United States* v. *Shaw,* 309 U. S. 495, 501; *New England Maritime Co.* v. *United States,* (D. Mass.) 1932 A. M. C. 323, 55 F. 2d 674, 685, aff'd without opinion 73 F. 2d 1016; cf. *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. at 222. So Judge Cardozo, in *Anderson* v. *Hayes Const. Co.,* (1926) 243 N. Y. 140, 147, 153 N. E. 28, 29, observed, "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

II

The district court had no jurisdiction to award interest at six percent in accordance with local law instead of at four percent as authorized by the suits in Admiralty Act

The court below correctly followed the Public Vessels Act in confining its award of interest to the period subsequent to the entry of the decree (R. 36,

39). See 46 U. S. Code 782. But the court, erroneously in our view, applied the local six percent rate instead of the four percent rate which marks the limit of its jurisdiction by reason of the provision of the Suits in Admiralty Act (46 U. S. Code 743).

With respect to the question of interest, the Public Vessels Act incorporates by reference the provision of the Suits in Admiralty Act. The Public Vessels Act provides (46 U. S. Code 782):

> Such suit shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title [the Suits in Admiralty Act] or any amendment thereof, insofar as the same is not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

The Suits in Admiralty Act provides (46 U. S. Code 743):

> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States * * * may include costs of suit and, when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based.

Appellee's contract of employment made no provision for interest in the event of breach at any higher rate or at all.

We believe that the Public Vessels and Suits in Admiralty Acts limit the jurisdiction of the district court to award interest so that it has no power to make an award in excess of four precent. This is the usual rate allowed against the Government and is the same rate which is provided by the Tucker and Tort Claims Acts (28 U. S. Code 2411, 2516). Until recently the four percent rate has gone unchallenged. The ground given for the contrary holdings in recent district court cases, and which, we assume, the court below also adopted, is that the rate of interest is not one of the matters of *procedure* referred by Section 782 of the Public Vessels Act to Section 743 of the Suits in Admiralty Act, but is exclusively dealt with in Section 782, which merely forbids the allowance of interest prior to the rendition of judgment but names no rate.

We believe, on the contrary, that the Congressional language and intention, to refer the rate of interest to the earlier Act, is plain and that the four percent rate is to prevail. Exactly the same question arose in respect of the incorporation in the Public Vessels Act by reference of the statute of limitations of the Suits in Admiralty Act. The Government's position was upheld as to the limitation question in *Phalen* v. *United States,* (2d Cir.) 1929 A. M. C. 723, 32 F. 2d 687. We believe the same principle controls here.

The prohibition in 46 U. S. Code 782 of interest under the Public Vessels Act prior to judgment leaves the four percent rate controlling just as surely as does

the similar prohibition in 46 U. S. Code 745 of interest under the Suits in Admiralty Act prior to the filing of the libel. Cf. *United States* v. *Eastern SS. Lines,* (1st Cir.) 1949 A. M. C. 243, 171 F. 2d 589, 593–594; *National Bulk Carriers* v. *United States,* (3d Cir.) 1948 A. M. C. 735, 1563, 169 F. 2d 943, 949–951; *The Wright,* (2d Cir.) 1940 A. M. C. 735, 109 F. 2d 699, 701.

This interpretation accords with the general rule that interest is not awarded against the United States in the absence of the plainest and most obvious language. *United States* v. *New York Rayon Co.,* (1947) 329 U. S. 654, 658; *United States* v. *Thayer West Point Hotel Co.,* (1947) 329 U. S. 585; *Albrecht* v. *United States,* (1947) 329 U. S. 599, 605; *Boston Sand & Gravel Co.* v. *United States,* (1928) 278 U. S. 41, 47. It applies the traditional immunity of the sovereign from payment of interest. *United States* v. *Goltra,* (1941) 312 U. S. 203, 207; *Smyth* v. *United States,* (1937) 302 U. S. 329, 353; *United States* v. *North Carolina,* (1890) 136 U. S. 211, 216; *Angarica* v. *Bayard,* (1888) 127 U. S. 251, 260. We accordingly submit that this Court should modify the decree of the court below so as to award interest at the rate of four percent instead of the six percent rate now provided by the decree.

CONCLUSION

For the foregoing reasons, unless this Court should decide to overrule its prior decisions and reverse in No. 12,400, *Thomason et al* v. *United States,* we believe that the judgment of the court should be

affirmed subject only to being modified so as to reduce the award of interest to four percent.

Respectfully submitted,

H. G. MORISON,
Assistant Attorney General.

LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General.

J. CHARLES DENNIS,
United States Attorney,

JOHN E. BELCHER,
Assistant United States Attorney.

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